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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL VANCE WITHERSPOON, Defendant and Appellant.	C086372 (Super. Ct. Nos. 14F2287, 14F7575, 15F957, 15F1019, 16F5678, 17F2434)

Convicted of numerous felony offenses, including seven convictions for escaping from his home detention program, defendant Michael Vance Witherspoon moved the trial court for an order reducing his escape convictions to misdemeanors. The trial court granted his motion with respect to three convictions, but denied it as to the remaining four.

On appeal, defendant contends the trial court abused its discretion in denying his motion relative to those four convictions. Finding the trial court acted within its discretion, we affirm the judgment.

BACKGROUND

In 2016, defendant was released from county jail and placed in an alternative custody program that allowed him to reside at home and work or take college courses rather than serve his sentence in jail. The program required defendant to wear an ankle monitor and to remain within 400 feet of his residence (the "inclusion zone" or "place of confinement") from 9:00 p.m. to 6:00 a.m. each day ("time of confinement"). On May 19, 2017, in Shasta County Superior Court case No. 17F2434, the People charged defendant with 10 counts of escaping from his home detention by violating his curfew. (Pen. Code, § 4532, subd. (b)(1).)[1]

A jury found defendant guilty on seven felony counts of escape—counts 4 through 10, summarized as follows:

Count 4: On May 28, 2016, defendant arrived home at 9:33 p.m. Before heading home, defendant was near a Jack in the Box or "ampm" about two-tenths of a mile from his home.

Count 5: On June 9, 2016, defendant left his residence at 9:03 p.m. and returned at 9:21 p.m. During that time, defendant was approximately four-tenths of a mile away from his residence, near an Ace Hardware store.

Count 6: June 19, 2016, defendant arrived home at 9:15 p.m., left home at 10:18 p.m., then returned home at 10:24 p.m. "In and around 9:00 p.m.," defendant was approximately five miles away from home, near a Walmart.

Count 7: On July 20, 2016, defendant arrived at his residence at 9:24 p.m. Defendant was approximately one-tenth of a mile away from his residence, near a neighboring hotel, when his curfew began.

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[1] Undesignated statutory references are to the Penal Code.

Count 8: On August 1, 2016, defendant left his residence at 9:23 p.m. and returned at 9:39 p.m. Defendant travelled approximately one-tenth of a mile away from his place of confinement, again to a neighboring hotel.

Count 9: On August 5, 2016, defendant left his place of confinement at 12:39 a.m. and returned at 12:56 a.m. Defendant again travelled to the nearby "Jack in the Box/ampm area," approximately three-tenths of a mile from his place of confinement.

Count 10: On August 8, 2016, defendant was out of his place of confinement from 9:02 p.m. until 9:20 p.m. He travelled approximately two miles away during that time.

The jury found defendant not guilty of the escape offense charged in count 1 and could not reach a verdict on those offenses charged in counts 2 and 3.[2]

Defendant subsequently moved the trial court to reduce his seven escape convictions from felonies to misdemeanors pursuant to section 17, subdivision (b). The trial court "spent considerable time considering the [section] 17[, subdivision] (b) motion and . . . considered very individualized consideration in this case of the offenses, the offender, as well as the public interest." The court acknowledged defendant's lengthy criminal history, but found some of defendant's escapes were "of a de minimis nature when you consider the time elements, meaning the time that the evidence showed the defendant being outside of the inclusion zone."

The trial court reasoned that "there should be a distinction between time periods when the Defendant is running late and entering his inclusion zone versus making the intentional decision to leave after his period of confinement . . . ." And thus, on counts 4, 7, and 10, where the court found a potential innocent explanation for defendant being outside the inclusion zone after his time of confinement, the court reduced defendant's

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[2] On the People's motion, the trial court dismissed counts 2 and 3.

convictions to misdemeanors. For the remaining convictions on counts 5, 6, 8, and 9, the court found defendant made an "intentional choice" to leave the inclusion zone after his time of confinement and denied defendant's motion as to those convictions.

DISCUSSION

Defendant contends the trial court abused its discretion in refusing to reduce his convictions on counts 5, 6, 8, and 9 to misdemeanors. We are not persuaded.

Section 17, subdivision (b) "authorizes the reduction of 'wobbler' offenses—crimes that, in the trial court's discretion, may be sentenced alternately as felonies or misdemeanors—upon imposition of a punishment other than state prison (§ 17[, subd.] (b)(1)) or by declaration as a misdemeanor after a grant of probation (§ 17[, subd.] (b)(3))." (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 974 (*Alvarez*).) The crime of escape under section 4532, subdivision (b) is a wobbler when, as here, it is not by force or violence. (See *People v. Lozano* (1987) 192 Cal.App.3d 618, 630, fn. 12.)

Trial courts possess "broad discretion" when determining whether to reduce a felony wobbler offense to a misdemeanor. (*People v. Clancey* (2013) 56 Cal.4th 562, 579.) Discretion under section 17, subdivision (b) is contextual and thus "those factors that direct similar sentencing decisions are relevant, including 'the nature and circumstances of the offense, or [defendant's] traits of character evidenced by his [or her] behavior and demeanor at the trial.' " (*Alvarez, supra,* 14 Cal.4th at p. 978.) Trial courts also must consider a defendant's criminal history. (*Id.* at p. 979.) In sum, the trial court must base its decision upon an "individualized consideration of the offense, the offender, and the public interest." (*Id.* at p. 978.)

A trial court's sentencing decision is reviewed for an abuse of discretion and will not be disturbed on appeal unless the party attacking the decision clearly shows the decision was irrational or arbitrary. (*Alvarez, supra*, 14 Cal.4th at pp. 977-978.)

Here, defendant has not carried his burden of establishing an abuse of discretion. In denying defendant's motion to reduce his escape convictions in counts 5, 6, 8, and 9 to

misdemeanors, the trial court noted defendant's lengthy criminal history. (*Alvarez, supra*, 14 Cal.4th at p. 979.) It also considered the nature of the several escape offenses. In so doing, the court made a clear distinction between those offenses that may have been accidental or incidental, and those defendant could only have committed with a clear disregard for the terms of his alternative custody program. The court denied defendant's motion only for those offenses that demonstrated defendant's disregard for the terms of his confinement. We cannot say this decision was irrational or arbitrary. We thus conclude there was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

KRAUSE, J.

We concur:

MAURO, Acting P. J.

MURRAY, J.